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IN THE

Supreme Court of the United States

OCTOBER TERM--1944

No. 1166

GREATER NEW YORK BROADCASTING CORPORATION,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No. _____

GREATER NEW YORK BROADCASTING CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Greater New York Broadcasting Corporation, your petitioner, respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, entered February 26, 1945 (R. 68), which decreed enforcement of an order of the National Labor Relations Board against your petitioner, in a proceeding pursuant to Section 10 of the National Labor Relations Act (49 Stat. 452).

History of the Case

This cause came before the Circuit Court of Appeals, Second Circuit, upon a petition of the National Labor Relations Board dated April 20, 1944 (R. 1), for enforcement of its order issued March 30th, 1943, against petitioner, Greater New York Broadcasting Corporation.

The order (B. A. 1-8)[1] followed in the usual course upon the filing of amended charges on January 8th, 1941 (R. A. 327-331) by American Communications Association, CIO (herein called the "union" or "ACA"), upon which the Board issued a complaint on August 13th, 1941 (R. A. 332-341), whereupon, after joinder of issue, hearings were had from September 18th, 1941 to November 20th, 1941 (B. A. 14), and an Intermediate Report rendered by the Trial Examiner on April 25th, 1942 (B. A. 9-145).

The Board's order of March 30, 1943, which adopted the Findings and Conclusions of the Trial Examiner in all but a few minor respects (B. A. 2), found petitioner guilty of unfair labor practices, first, by interfering with, restraining and coercing its employees in the exercise of their rights in violation of Section 8(1) of the National Labor Relations Act; second, by refusing on November 4th, 1940 and thereafter to bargain collectively with the union in violation of Section 8(5) of the Act; third, by discrimination on and after December 5, 1940 in the hire and tenure of striking employees in violation of Section 8(3) of the Act (B. A. 139-140).

The order directed petitioner to cease and desist from interference, restraint and coercion; to bargain collectively

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[1] Throughout this petition and accompanying brief the following reference designations are used: B. A.—Board's Appendix to brief; R. A.—Respondent's (petitioner here) Appendix to brief; B. Ex.—Board's Exhibit; R. Ex.—Respondent's (petitioner here) Exhibit; B. B.—Board's brief in Circuit Court; R.—Vol. IV, Transcript of Record in this Court.

with the union in behalf of employees within the unit found by the Board's order to be appropriate; to offer 27 named striking employees immediate and full reinstatement to their former or substantially equivalent employment without prejudice to their seniority or their other rights and privileges; and to reimburse 26 of said striking employees and 3 additional named employees (total 29) for any loss of pay they may have suffered by reason of the petitioner's unlawful acts, by payment to each of them of a sum of money equal to that which he or she would normally have earned as wages during the period from the date of the application for reinstatement on December 5th, 1940, to the date of the petitioner's offer of reinstatement or placement on the preferential list as provided in the Board's order, less his net earnings during such period (B. A. 1-8).

A further provision of the Board's order which is vital to a consideration of the questions here presented for review, was as follows:

> "It is further ordered that the complaint be, and it hereby is, dismissed, insofar as it alleges that the respondent: (1) discharged any of its employees on or about November 3 and 4, 1940; * * *" (B. A. 7).

The Board's order also denied (B. A. 1), petitioner's motion made to the Board on May 26, 1942, after the Trial Examiner had rendered his Intermediate Report, for leave to adduce additional evidence bearing on the commission of sabotage at petitioner's radio station by certain employees who the Trial Examiner had found had been discriminated against in regard to their hire and tenure of employment, but who petitioner asserted had been discharged because of their participation in the commission of such sabotage (R. 41-50).

After the issuance of the Board's order, and immediately upon the institution of enforcement proceedings in the Circuit Court of Appeals, petitioner on May 19, 1944,

made a similar application to the Court under Section 10(e) of the National Labor Relations Act for leave to adduce additional evidence as to the commission of the alleged sabotage, and as to the bearing of such sabotage on petitioner's discharge of and refusal to reinstate such employees (R. 5-41). The motion was opposed by the Board (R. 61-63), and denied without opinion by the Court on June 27, 1944 (R. 63).

The Circuit Court of Appeals, thereafter granted enforcement of the Board's order in its entirety. The opinion of the Court, rendered February 6, 1945, is appended to the record (R. 64-67), and is not yet officially reported.

Enforcement of the Board's order has been stayed by the Circuit Court of Appeals pending the determination of this application for a writ of certiorari.

Summary Statement of Matters Involved

Petitioner operates Radio Station WOV, maintaining studios in New York City and its transmitter in Kearney, New Jersey. At the time here in question petitioner employed 39 persons consisting of 10 technicians, 10 announcers, 2 sound-effects men and 17 miscellaneous employees.

This controversy stems from a strike called by the Union on November 3, 1940 and which continued to December 5, 1940. The strike was called on November 3rd, in the midst of collective bargaining negotiations between the Union and petitioner, which had proceeded since September 28, 1940 (B. A. 23-41). The cause of the strike, in which 34 employees joined, was the Union's claim that petitioner was not bargaining in good faith (B. A. 41). The Board found, however, that petitioner was actually bargaining in good faith with the Union when the strike was called, and that *the strike was not caused by any unfair labor practice on the part of petitioner* (B. A. 105-106; 115).

Coincident with the calling of the strike, and as part of their strike action, the union officials caused the station to be abruptly shut down by the employees and taken off the air at 3:30 P. M. on November 3rd, 1940 notwithstanding they knew programs were scheduled to be broadcast continuously until midnight (B. A. 41; R. A. 72). When the strikers refused petitioner's request to restore the station to the air (B. A. 42-43), petitioner immediately engaged the services of other engineers who attempted to do so but without success, because it was found that the delicate radio equipment at both the studio and transmitter had been deliberately and extensively sabotaged (B. A. 123; 1337-1341). It was not until 4:30 P. M. the following day, November 4th, after 25 hours had elapsed, that they succeeded in restoring the equipment to normal condition and returned the station to the air (B. A. 53, 62).

Promptly upon the discovery of the sabotage at the New York studio premises on November 3rd, and at the New Jersey transmitter on the morning of November 4th, petitioner discharged all the employees who had been present at the studio and transmitter premises at the time of the shutdown and who alone could have committed or permitted the sabotage (B. A. 967; R. A. 232a). These employees numbered 15 of the 34 on strike (B. A. 13). Similarly, when the strike ended on December 5th, and the union requested blanket reinstatement of all the 34 striking employees (B. A. 65), those 15 so discharged for the sabotage were denied reinstatement, while most of the other strikers who had not been involved in the sabotage were reinstated (B. A. 11, footnote 1).

Thereafter, on August 13, 1941, the Board commenced this proceeding against the petitioner by the issuance of a complaint in which it alleged, among other things, that petitioner "did on or about November 3 and 4, 1940, discharge" the said 15 employees, among others (Complt. ¶¶ 4 and 8; R. A. 333-335); that after their discharge, petitioner refused

to reinstate said 15 employees (Complt. ¶¶ 5 and 9; R. A. 334-335); and that petitioner's discharge of those 15 men and its refusal to reinstate them was because of their union activities (Complt. ¶ 14; R. A. 336).

Petitioner interposed an amended answer, in which it expressly admitted the discharge of those 15 men "at the time mentioned" in the complaint (Am. Ans. ¶ "First"; R. A. 345) and also petitioner's refusal to thereafter reinstate them (Am. Ans. ¶ "Second"; R. A. 346); denied that their union activities were the cause thereof; and affirmatively alleged that those 15 men had been discharged because of the commission of the sabotage and for other good and sufficient cause, and that petitioner had thereafter refused them reinstatement for the same cause (Am. Ans. ¶ "Eleventh"; R. A. 348-349).

In view of the above express admission in the answer of the allegation in the complaint that those 15 men had been discharged and refused reinstatement, the sole issue framed by the pleadings with respect to those 15 men was the *cause* of their discharge and refusal of reinstatement; viz., whether they had been discharged and refused such reinstatement because of their union activities as alleged in the complaint on the one hand, or because of their participation in the commission of the sabotage as alleged in the amended answer on the other hand.

The determination of that issue was crucial, not only on the question of the Board's power to direct their reinstatement with back pay, but also to direct petitioner to bargain with the union, for it was conceded that if those 15 men had been discharged for valid cause on November 3-4, 1940, the union thereby lost its majority.

On those pleadings, with the issue thus clearly defined, the case proceeded to trial on September 18, 1941, and lasted ten weeks. The pleadings marked the boundaries within which the case was tried. At no time was there any

departure by any of the parties from the issues as framed by the pleadings. Two motions made by the Board at the end of its own case (R. A. 167-8), and at the close of the entire case (R. A. 323-4), to conform the pleadings to the proof were granted only to the extent of correcting minor errors in names and dates, and the Board expressly stated that such motions were not intended to change the theory of the action in any way or the allegations of the complaint on the merits (R. A. 323-4).

When the Board rendered its decision, however, it completely ignored the issue as to those 15 men so clearly framed by the pleadings, and found, contrary to the admission in the pleadings, that those 15 men *had not been discharged at all* on or about November 3rd or 4th, 1940 (B. A. 118, 123); that they had merely been "threatened" with discharge on or about those dates (B. A. 116-117); and that petitioner had thereafter denied them reinstatement when requested on December 5th, 1940, in order to make good that "threat" (B. A. 128). In so holding, the Board expressly *dismissed* the allegation of the complaint which alleged that those men had been discharged on or about November 3rd and 4th (B. A. 7), and which allegation had been admitted in petitioner's amended answer (R. A. 345-6).

The Board further held that in view of its finding that those 15 men were not discharged by petitioner on or about November 3rd and 4th, it was unnecessary to determine the question of whether or not sabotage had been committed, which sabotage had been asserted by petitioner's answer as the cause for their discharges; and, in fact, the Board did not decide that issue (R. 62; R. A. 555). On the finding so made by the Board in complete disregard of the single issue framed by the pleadings, and directly contrary to the admission in the pleadings, the Board rested its order directing the petitioner not only to reinstate those 15 men with back pay but also to bargain with the union.

In resisting enforcement of the Board's order, petitioner contended before the Circuit Court of Appeals, that it was conclusively established by the pleadings (by which petitioner and the Board were bound) that those 15 men had been discharged on or about November 3rd and 4th; that the Board could not conclude that petitioner's refusal to reinstate them thereafter on December 5th when requested, was improper, unless the Board found, on substantial evidence, that their discharges on November 3rd or 4th had been improper and discriminatory rather than for cause; and that the Board made no such finding and could not have done so on the basis of any record evidence (R. 64).

Surprising as it may seem, when the Court rendered its decision granting enforcement, it reverted to the pleadings and rested its determination upon a holding (directly contrary to the finding of the Board) that those 15 men had been discharged as the complaint alleged (R. 65). The Court took the view that petitioner's refusal to reinstate those men (on December 5, 1940) was in effect a discharge; that when the Board found that petitioner refused to reinstate those men on December 5th "the Board thus, in effect, found that (petitioner) discharged these employees" (R. 65); and that such "discharges" on the date of December 5th were open to proof within the reasonable limits of the allegation of the complaint which alleged that the discharges occurred not on November 3rd and 4th but "on or about" those dates (Opinion, R. 65).

Manifestly, the holding of the Court constituted a decision *de novo*, which the Board did not make and which the Court had no power to make. The Board's order expressly dismissed the allegations of the complaint which alleged the discharges of those men on or about November 3 and 4, 1940 (B. A. 7; p. 3, *supra*), and held that no discharges occurred. The Court was therefore without power to sustain the Board's order upon a holding to the contrary that

the discharges *had* been established and found by the Board within the allegations of the complaint which the Board had itself expressly dismissed as unproved.

Further details as to the matters involved herein appear below, under the heading "Reasons Relied on for the Allowance of the Writ."

Jurisdiction

The jurisdiction of this Court to review the decree of the Circuit Court of Appeals is invoked under Section 10(e) of the National Labor Relations Act, and Section 240(a) of the Judicial Code.

Questions Presented

1. Whether the Board's order was void for want of due process where, after the case had been fully tried on pleadings in which the issues were clearly defined and the proof limited solely to those issues, the Board in rendering its Decision and Order entirely abandoned the very substance of the main and principal charge which petitioner had been summoned to defend, and substituted as the basis for its order, an entirely different charge which it resolved against petitioner, but which had never been put in issue, had never been litigated, could not have been anticipated by petitioner and which petitioner had no opportunity to meet; and except for which a dismissal of the entire complaint by the Board would have been unavoidable.

2. Where the Board and petitioner had conclusively stipulated in their respective pleadings as to a decisive fact in the case (that the 15 men had been discharged on November 3-4), and thus removed it as an issue, and the parties proceeded with the trial in reliance upon the stipula-

tion, recognizing the stipulated fact as established in the case, permitting of no controversy, requiring no proof, and for all purposes of the proceeding taken to be true, but the Board nevertheless in issuing its decision not only ignored the stipulated fact completely, but rested its order on a finding of fact (that the 15 men had never been discharged), directly contrary to the fact as so stipulated and unlitigated, may such unwarranted finding by the Board be held as a matter of law, and on any theory, to be supported by substantial evidence?

3. Whether, in holding that the decision of this Court in *National Labor Relations Board* v. *Mackay*, 304 U. S. 333, 348, was here decisive on the issue of due process, the Circuit Court of Appeals did not misread its teaching and improperly extend its authority to the clearly distinguishable factual situation in this case.

4. Whether the Circuit Court of Appeals had the power, as a basis for enforcement of the Board's order, to render a decision on the evidence *de novo* embodying a factual finding on a decisive issue (the discharges), directly contrary to the finding made by the Board itself on that issue, and which latter necessarily called for a denial of enforcement.

5. Where the complaint alleged that petitioner discharged its employees on or about November 3-4, 1940, but the Board found that no discharges had in fact occurred and expressly dismissed that allegation of the complaint, was it not palpable error appearing on the face of the opinion, for the Circuit Court of Appeals to construe the finding of the Board to the contrary, and to hold that the finding of the Board was to the effect that petitioner did discharge its employees within the allegation of the complaint which the Board had expressly dismissed.

6. Whether it was an abuse of discretion for the Board and the Circuit Court of Appeals to deny petitioner's motions for leave to adduce additional evidence as to the sabotage committed at petitioner's radio station on November 3-4, 1940 and as to the bearing of such sabotage upon petitioner's discharge of and its refusal to reinstate the 15 men.

Subordinate Questions

The following additional questions are errors which are assigned, and which, though perhaps not in themselves of sufficient importance or general interest to warrant granting the petition, further demonstrate, when considered with the other questions presented, the merit of this petition and the cumulative grounds which exist for reversal of the decree below:

7. Where in the course of bargaining negotiations between petitioner and the Union, both agreed that the disputed questions of (1) appropriate bargaining unit and (2) the Union's majority representation, should be determined by the National Labor Relations Board, and such questions were actually submitted to the Board pursuant to such agreement, but never decided by the Board because of the Union's subsequent unilateral action in tabling the same coincident with the calling of the strike, did petitioner's refusal to bargain with the Union during and after the strike and before those issues were determined by the Board, constitute as a matter of law, a violation of Section 8(5) of the National Labor Relations Act, as the Board found?

8. Whether there was any substantial evidence in the record to support the Board's finding (1) that the strike was prolonged by unfair labor practices on the part of the employer and (2) that petitioner discriminated in regard

to hire and tenure of employment of strikers, not discharged, who were not reinstated.

Reasons Relied on for Allowance of the Writ

As to Question #1:—*Whether the Board's order was void for want of due process.*

Petitioner's contention in this case of a denial of due process and deprivation of substantial rights guaranteed by the Fifth Amendment rests upon the undisputed fact that while the specific issue pleaded and tried was whether the 15 men *admittedly discharged* had been so discharged for valid cause as the petitioner alleged or for union activities as the Board alleged, the Board nevertheless decided the case adverse to petitioner on the wholly different ground that those 15 men had never been discharged at all—a ground not only not put in issue and not litigated, but squarely in conflict with the admissions in the pleadings to the contrary.

That unwarranted finding of the Board was crucial and decisive of the case, for upon it was founded the provisions of the Board's order directing petitioner to reinstate those men with back pay and also to recognize and bargain with the union.

Pleadings and a distinct issue are essential in every system of jurisprudence. There can be no orderly administration of justice without them. If a party can allege one cause of action and then recover on another, his complaint will serve no useful purpose but rather to ensnare and mislead his adversary. Such was the situation in this case; the Board completely failed to prove the cause of action alleged in the complaint, but nevertheless issued its order against petitioner on grounds neither pleaded nor tried. Due process requires that such an order be not permitted to stand. In granting enforcement of the Board's order

the Circuit Court of Appeals so far sanctioned such a flagrant departure by the Board from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The error should be reviewed and corrected (Supreme Court Rule 38, Section 5(b)).

As to Question #2:—*Whether the finding of the Board to the effect that the 15 men were not discharged at all, can be held as a matter of law to be supported by substantial evidence in the face of the clear admissions in the pleadings that they were discharged.*

Aside from the question of denial of due process, the Board's finding that the 15 men were not discharged, flies in the face of the admitted, stipulated and unlitigated fact, by which the Board was bound, that those men were discharged on or about November 3-4, 1940. The complaint alleged it; the answer admitted it. Under such circumstances, the finding of the Board was wholly unwarranted, and as a matter of law could not be supported by substantial evidence.

The palpable error of the Board's finding, which the Circuit Court of Appeals refused to disturb, should be reviewed and corrected by this Court (*Postal Telegraph Co.* v. *Newport*, 247 U. S. 464, 473).

As to Question #3:—*Whether the Circuit Court of Appeals properly applied to the facts in this case the doctrine of National Labor Relations Board* v. *Mackay*, 304 U. S. 333, 348.

In holding that the conflict between the Board's finding on the one hand, and the admission in the pleadings on the other hand, did not call for a denial of enforcement, the Circuit Court of Appeals quoted *in extenso* from the opinion of this Court in the *Mackay Radio* case (*supra*), which it considered controlling. The opinion in that case,

however, discloses that an entirely different factual situation there existed. There, the Court found "that at no time during the hearing was there any misunderstanding as to what was the basis of the Board's complaint"; that the employer "understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory"; that the factual issues determined by the Board had been properly framed by the pleadings; "that the issues and contentions of the parties were clearly defined"; that the issues determined by the Board had been fully litigated during the hearing, and, finally, that at the close of the trial the pleadings had been conformed to the proof.

Not so in the case at bar. Here, the issue of the discharges was out of the case from the outset by virtue of the admission in the pleadings that they had been discharged. Only the *cause* of their discharge was litigated; and that was the only issue as to the 15 men framed by the pleadings. None of the parties at any time throughout the trial indicated a desire to depart from the framework of the pleadings and, in fact, they did not; and at the close of the trial the Board's motion to conform the pleadings to the proof was granted only to the extent of correcting minor errors in names and dates, and expressly excluding any amendment of the complaint which would change the theory of the case in any way or the allegations of the complaint on the merits (R. A. 323-324).

Hence, it is clear that in this case, petitioner is asserting no mere technicality as did the employer in the *Mackay* case. Here, there is a clear showing that the conflict between the Board's finding and the pleadings deprived the petitioner of substantial rights, to its extreme prejudice, in violation of the guarantee of the Fifth Amendment. The Circuit Court of Appeals was in error when it held the *Mackay* case here controlling; and this Court should review and correct that error as in conflict with applicable

decisions of this Court (Supreme Court Rule 38, Section 5(b)).

As to Questions #4 and #5:—*Whether the Circuit Court of Appeals had the power to render a decision on the evidence de novo; and whether the Court committed palpable error, appearing on the face of its opinion, when it held that the Board had found the discharge of the 15 men when actually the Board had expressly refused to make such finding.*

Under Section 10(e) of the National Labor Relations Act, the province of the Circuit Court is limited solely to determining whether there is substantial evidence to support the Board's findings. There is no power in the Court to render a decision on the evidence *de novo*, which the Circuit Court in this case undertook to do. It held that the 15 men had been discharged when in fact no such finding had been made by the Board. It held that the Board had found, in effect, that those 15 men had been discharged as alleged in the complaint, when in truth the Board had refused to so find and had expressly dismissed the complaint in so far as it alleged such discharges (see p. 3, *supra*). For the correction of such clear and palpable error appearing on the face of the opinion of the Court and the order of the Board, this Court should grant review. (*Postal Telegraph Co.* v. *Newport* (*supra*); Supreme Court Rule 38, Section 5(b).)

As to Question #6:—*Whether it was an abuse of discretion for the Board and the Circuit Court of Appeals to deny petitioner's motions for leave to adduce additional evidence.*

During the hearing much evidence was adduced on the issue of the commission of sabotage, since the determination of that question would resolve the further issue as to whether the 15 men admittedly discharged and refused reinstatement had been so discharged and refused reinstate-

ment for valid cause or for union activities. Nevertheless, the Trial Examiner, in rendering his report, failed to pass on the question as to whether or not sabotage had been committed (R. 62; R. A. 555). The petitioner, thereupon, addressed a motion to the Board for leave to adduce additional evidence on that subject, with the view of having the issue of sabotage determined by the Board one way or another (R. 41). The Board denied the motion in its order adopting the Trial Examiner's report (B. A. 1).

When enforcement proceedings were instituted in the Circuit Court of Appeals petitioner made a similar motion requesting similar relief (R. 5). The Board opposed the motion on the ground that the issue of sabotage was not material (R. 62; R. A. 555), and the Court denied the motion (R. 63).

Petitioner respectfully submits that since the issue of the commission of sabotage was vital on the question of the justification for the discharge of the 15 employees, and since the Board did not reach a decision on that issue upon the evidence already in the record, it was an abuse of discretion to deny the petitioner's motion to adduce additional evidence (*Corning Glass Works* v. *NLRB*, 129 F. (2d) 967, 972). Especially was this so in view of petitioner's clear showing of valid and cogent reasons for its failure to adduce such additional evidence during the hearings (R. 16-21). Under the circumstances the denial of the motion constituted a denial of due process which this Court should remedy (Supreme Court Rule 38, Section 5(b)).

As to Question #7:—*Whether, as a matter of law, petitioner was guilty of a violation of Section 8(5) of the National Labor Relations Act, where there existed an express agreement between petitioner and the union to have the disputed questions of appropriate unit and the union's majority representation first determined by the National*

Labor Relations Board, and such questions while submitted to the Board, were never decided by reason of the union's subsequent unilateral action.

In the negotiations between the petitioner and the union immediately preceding the strike on November 3rd, the parties were in bona fide disagreement as to the appropriate bargaining unit and also as to the union's majority representation. Accordingly, they agreed to have those questions determined by the National Labor Relations Board, and pursuant to such agreement the union actually instituted a proceeding under Section 9 of the National Labor Relations Act wherein those questions would necessarily be resolved by the Board (B. A. 26). Pending determination of those issues by the Board the parties undertook negotiations of terms and provisions of employment which would be applicable to the employees in the event that the union's claim of majority representation should be established by the Board (B. A. 35-36). In the midst of those negotiations the Union called the strike and simultaneously notified the Board to table the proceeding which had been instituted for the determination of the disputed questions (B. A. 1299). As a result, there was never any determination by the Board as to the appropriate bargaining unit or the union's majority representation.

The Board in this proceeding held, notwithstanding, that the petitioner's refusal to treat with the union during the strike or to bargain collectively with the union during the strike, constituted a violation of Section 8(5) of the Act; and the Circuit Court, in granting enforcement, sustained the Board's view. The holding is so clearly contrary to numerous decisions of the Courts and the Board which hold that under such circumstances an employer is under no duty to bargain with the union (*cf. NLRB* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552), that the error should be reviewed and corrected by this Court (Supreme Court Rule 38, Section 5(b)).

As to Question #8:—*Whether the Board's findings that the strike was prolonged by unfair labor practices, and that the petitioner discriminated against strikers, not discharged, were supported by substantial evidence.*

It is submitted that the findings above referred to are wholly without support in the record. The question is more fully discussed in the annexed brief, and review is respectfully requested.

PRAYER

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out and under the seal of this Court, directed to the United States Circuit Court of Appeals, Second Circuit, to the end that the order and judgment of the said Circuit Court of Appeals in this cause be reviewed and reversed, and for such other and further relief as may be just and proper.

Dated, April 11, 1945.

GREATER NEW YORK BROADCASTING CORPORATION,

By SANFORD H. COHEN,
Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No.

GREATER NEW YORK BROADCASTING CORPORATION,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION

POINT I

(On Questions Presented, #1, 2, and 3)

The Board's order, insofar as it directed petitioner to reinstate the 15 men with back pay, and also to bargain with the Union, was void for want of due process, and also because the finding upon which it was based to the effect that those men were not discharged at all, was unsupported by substantial evidence as a matter of law.

A.

The record furnishes no basis whatever for the Board's finding that those 15 men were not discharged at all. That respondent did discharge them on November 3-4 was conclusively established by the pleadings and was not even an issue in the case. Only the cause of their discharge was put in issue by the pleadings and litigated at the hearing. Hence the finding that they were not discharged at all cannot be sustained.

The Board's complaint (B. Ex. 1(2), R.A. 332-341) specifically alleged that petitioner "did on or about November 3-4, 1940 *discharge* the following persons employed at its said New York office and Kearney transmitting plant" (Complt. ¶¶ 4 and 8), naming a list of employees including the 15 above mentioned, that petitioner "refuses and has continued to refuse to date to reinstate the *discharged* employees above referred to * * * since their respective dates of *discharge* to their former positions or employment" (Complt. ¶¶ 5 and 9); that the petitioner *discharged* and refused to reinstate said employees because they joined and assisted the Union and because said employees engaged in a strike and other concerted activities (Complt. ¶ 14),[1] and that petitioner did thereby discriminate in regard to the hire or tenure or conditions of employment of said employees (Complt. ¶ 22).

The petitioner's amended answer (B. Ex. 1(8), R.A. 341-350) expressly *admitted* the discharge of those 15 men (Am. Ans. ¶¶ "First" and "Fifth"); denied that their aforesaid discharge and denial of reinstatement was because they joined or assisted the Union or engaged in a strike or other concerted activities as alleged in the complaint (Am. Ans. ¶ "Eleventh"); and alleged affirmatively

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[1] The above allegations as to the discharges of those employees are in substance the same as contained in the Union's amended charge filed against respondent on January 18, 1941 (B. Ex. 1(1), R.A. 327-331), and upon which charge the complaint was issued.

that they were discharged for good and sufficient cause therein detailed and that they were subsequently refused re-employment for the same causes for which they had been discharged (Am. Ans. ¶ "Eleventh").

Thus, the discharge of those 15 men on November 3-4 was an established fact in the case, conclusively stipulated in the pleadings of both the Board and petitioner, which permitted of no controversy, required no proof and for all purposes of the proceeding was to be taken as true. *Dunham* v. *Cudlipp*, 94 N. Y. 129; *Altemus* v. *Talmadge*, 58 F. (2d) 874, 877; *Central R. R. of N. J.* v. *Stoermer*, 51 F. 518 C. C. A.); *L. P. Larsen Jr.* v. *Wm. Wrigley Jr. Co.*, 253 F. 914, 918 (C. C. A.). The only issue relating to the subject of discharges which the Board was called upon to determine under the pleadings, was whether those 15 men were discharged for Union activities, as the Board alleged, on the one hand, or for misconduct and other valid cause, as the petitioner alleged, on the other hand (R.A. 348-349).

What did the Board do with respect to that issue so clearly defined by the pleadings? In the light of the Board's own finding that petitioner had been bargaining in good faith up to the very moment of the strike on November 3, and that the strike was not the result of any unfair labor practice on the part of the petitioner, the Board could not very well find, and there is not a scintilla of evidence which would sustain a finding, that those 15 men were discharged on November 3-4 without valid cause or because of their Union activities; and yet, on the other hand, for the Board to have made an affirmative finding that those men *were* validly discharged on that date, would have destroyed the Board's entire case against respondent.[2] The Board, there-

[2] A finding to the effect that the 15 men were validly discharged would necessarily have precluded a direction in the Board's order, such as is now contained therein, requiring the respondent to reinstate those men with back-pay. It would also have precluded a direction, now therein contained, requiring respondent to recognize and bargain with the Union; for by reason of those valid discharges, the Union lost its majority status as hereinbelow demonstrated.

fore, wholly ignored that issue—the issue as to the *cause* of the discharges—and instead made a gratuitous finding, wholly outside the issues of the case and directly contrary to the fact stipulated in the pleadings, that those 15 men *were not discharged at all* on November 3-4 or at any other time; that they were merely "threatened" on that date with loss of their jobs (B.A. 118); that petitioner did not then "actually discharge" any of them but "rather used threats of loss of employee status in an attempt to break the strike * * *" (B.A. 116-117).[3]

Patently there was no warrant in the Board to make that finding, since no such issue was presented by the pleadings or litigated at the hearing, directly or indirectly. *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332; *NLRB* v. *Citizen-*

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[3] This unwarranted and erroneous finding, to the effect that the 15 men were not discharged but only threatened with discharge on November 3-4, constitutes the sole and entire foundation upon which the Board has built its whole case against petitioner, for upon that finding the Board proceeds to make and rest these further vital findings: (1) that since those 15 men were not discharged on November 3-4, they thereafter retained their status as striking "employees" (B.A. 133); (2) that as "employees," they were entitled to reinstatement to their positions without loss of seniority or other rights, when same was requested at the end of the strike on December 5, 1940 (B.A. 133); (3) that since they were not discharged on November 3-4, petitioner discriminated against them when it treated them on December 5 as applicants for new employment rather than as employees entitled to full reinstatement (B.A. 133, 120); (4) that from the fact that they were not discharged on November 3-4 but only "threatened" with discharge, it is evident that they were thereafter denied reinstatement because of petitioner's "primary determination" to make good that threat of loss of employment (R.A. 128); (5) that since they were not discharged on November 3-4, petitioner's later contention that they had been discharged was a "subterfuge to avoid bargaining with ACA" (B.A. 116-117); and (6) that since they were not discharged on November 3-4, the Union never lost its majority status, which would have resulted had they been in fact discharged (B.A. 108, Footnote; B.B. 36, Footnote; R.A. 274).

Manifestly, all of these derivative findings must fall with the collapse of the primary erroneous finding upon which alone they rest.

So, too, must fall the following arguments made in the Board's brief in the Circuit Court which stem from the same erroneous hypothesis that those men were not discharged on November 3-4:

> "In any event, even if petitioner sincerely believed that the strikers had tampered with its equipment, it at no time considered such misconduct serious enough to warrant their discharge" (B.B. 47);
>
> "It is thus apparent that petitioner cannot successfully defend its refusal to reinstate the 14 strikers on the ground that, shortly after the

News Co., 134 F. (2d) 970; *Morgan* v. *U. S.*, 298 U. S. 468; *Morgan* v. *U. S.*, 304 U. S. 1, 18; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274; *Altemus* v. *Talmadge, supra; J. P. Jorgenson* v. *Rapp*, 157 F. 732, 738. The pleadings marked the boundaries within which the case was tried and the proofs adduced (*Tinsdale* v. *Pres., etc., Delaware & Hudson Co.*, 116 N. Y. 419, 420); and since the discharge of those 15 men stood admitted by the pleadings, the Board was bound thereby as conclusively as were the parties themselves. *Williams* v. *Took*, 108 Fed. (2d) 758; *Postal Telegraph* v. *Newport*, 247 U. S. 464, 473; *Dunham* v. *Cudlipp, supra; Altemus* v. *Talmadge, supra; L. P. Larsen, Jr.* v. *William Wrigley Jr., Co., supra; J. P. Jorgenson* v. *Rapp, supra.*

"The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata* is fundamental in the administration of justice" *Wright* v. *Delafield*, 25 N. Y. 266, 268; *McNeil* v. *Cobb*, 186 A. D. (N. Y.) 177, aff'd 230 N. Y. 536; *Morgan* v. *U. S., supra; L. P. Larsen, Jr.* v. *Wm. Wrigley Jr., Co., supra;* and since the one question distinctly and explicitly put in issue by the pleadings and actually litigated was not whether those men were discharged or not, but rather whether, their discharges being admitted, they were discharged for valid cause or for Union activities, the Board's finding that those men *were not discharged*

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commencement of the strike, it terminated their employment for the perpetration of malicious mischief or other improprieties" (B.B. 42);

"The related argument that the Union lost its majority on November 3 and 4, when, petitioner claims, it discharged all strikers whom it deemed guilty of sabotage and misconduct, is considered in detail, *infra*, pages 40-42. Since, as is there pointed out, the Board properly found that none of the strikers was discharged at that time, this defense to the refusal to bargain is obviously without merit" (B.B. 36, Footnote 14).

All of the foregoing arguments of the Board, we repeat, become wholly untenable with the fall of the above erroneous factual finding from which they are drawn.

at all cannot be upheld even if there be some evidence which indirectly found its way into the record during the trial upon which that finding might be sustained. *McNeil* v. *Cobb, supra; U. S.* v. *Abilene & Southern Ry. Co., supra; J. P. Jorgenson* v. *Rapp, supra.* Such evidence must be disregarded and cannot form the basis for the Board's finding, for it bears no relation to the issue tendered by the pleadings. *McNeil* v. *Cobb, supra; Central R. R. of N. J.* v. *Stoermer, supra.* "The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata;* and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or *found judgments on grounds not put in issue, and distinctly and fairly litigated.*" *Wright* v. *Delafield,* 25 N. Y. 266, 270; *J. P. Jorgenson* v. *Rapp, supra; Morgan* v. *U. S.* (2 cases), *supra; Valley Mould & Iron Corp.* v. *NLRB,* 116 F. (2d) 760.

A different situation, perhaps, might here exist had the parties tried this case upon the merits without reference to the pleadings or to the issues framed thereby (*Dunham* v. *Cudlipp, supra*), or if petitioner by its silence or conduct had acquiesced in the trial of a new or different cause of action not alleged in the complaint (*McNeil* v. *Cobb, supra; NLRB* v. *Yale & Towne,* 114 F. (2d) 376 (C. C. A. 2)). But most certainly such was not the case. Time and again, by statements made during the trial, all parties, as well as the Trial Examiner, emphasized that the issues being tried were only those framed by the pleadings and not otherwise (R.A. 4-18; 37; 65-67; 74; 109-110; 156-159; 169; 171-5; 251; 312-313; 323-324; 861). Indeed, on the two occasions during the trial when counsel for the Board moved to conform the pleadings to the proof, petitioner opposed same

insofar as they might be intended to modify in any manner the cause of action alleged in the complaint; and in each instance, after the Board had indicated that such was not the purpose of the motion, the motion was granted only to the extent of correcting minor errors, such as incorrect dates or misspelled names (R.A. 167-8; 323-4). When the second of these motions was made at the very close of the trial, the following transpired:

> "Mr. Midonick (attorney for the Board): There are no further matters for the Board and the Board rests its case. I wish, however, to move at this time to conform the pleadings to the proof.
>
> Mr. Boudin (attorney for the Union): May I join in the same motion?
>
> Mr. Silverman (attorney for Petitioner): Now, Mr. Examiner, I oppose a general motion to conform the pleadings to the proof, unless the Board and the union indicate the respect in which they wish to have the pleadings so conformed. I have tried this case on the theory advanced by the Board and the union *as set forth in the complaint.* I do not wish to permit to go unopposed a motion by these parties generally made to conform the pleadings to the proof which might conceivably permit of the consideration of the merits of this case *on some theory which is not apparent from the pleadings themselves.* Now, I certainly will not oppose a motion to conform the pleadings to the proof if, for instance, it is a question of conforming a name or a date, but I do not think that there ought to be granted such a general motion, *especially in view of some of the statements that have been made by counsel for the union during the progress of this case as to what he considers is comprehended by certain allegations of the complaint, and in which I am in strong disagreement,* and I ask you to inquire of counsel what they have in mind when they make their motion asking that the pleadings be conformed to the proof.
>
> Trial Examiner Bellman: What is the nature of your motion to conform?

Mr. Midonick: The nature of the motion is *not to change the theory of the case in any way,* Mr. Examiner.

Mr. Silverman: *Or the allegations of your complaint, as I understand it, in any way which relates to the merits of any of the allegations.* Am I correct about that, Mr. Midonick?

Mr. Midonick: *I think your statement is a clear statement.*

Trial Examiner Bellman: In other words, this is the usual formal motion to correct minor defects such as variations in the spelling of names, and dates.

Mr. Midonick: That is quite correct.

Trial Examiner Bellman: *As so understood,* the motion is granted.

Do you oppose that motion?

Mr. Silverman: No, I do not, sir" (R.A. 323-324). (Italics ours.)

It is clear from the foregoing that up to the very close of the hearing, the pleadings and the issues tendered thereby remained exactly the same as they were at the outset of the trial; and that the only issues litigated throughout the trial were and remained those framed by the pleadings *and no others.* Obviously, since the discharges were admitted by the pleadings, petitioner was not called upon to, and in fact did not, adduce any proof to establish the same. *Altemus* v. *Talmadge, supra; Central Railroad of New Jersey* v. *Stoermer, supra; L. P. Larson, Jr.* v. *William Wrigley, Jr. Company, supra; NLRB* v. *Citizen-News Co., supra.* Any proof on the subject which did get into the record was adduced at the hearing and received in evidence only on the specific issue as to the *cause* of the discharges (R. Ex. 8, B.A. 1317; R. Ex. 10, B.A. 1320; R. Ex. 31, R.A. 465, B.A. 405-6; 990-2; 995-6; 1000; 1004; R.A. 232-238; 242-245; 251; 257; 267-270), not on any non-existent issue as to whether or not those discharges had occurred. Manifestly, therefore, the Board's order

rests on a finding of fact, not only not in issue, but directly contrary to the fact as stipulated in the pleadings of the parties. In brief, this case (unlike the *Mackay* case where the issue resolved was fully understood and litigated by the parties—see annexed Petition, pp. 13-15, *supra*) was pleaded and tried on one theory and decided on an entirely different theory, not directly or indirectly within the purview of the pleadings, and which petitioner had no opportunity to meet. "This is not a case of mere variance or mere defect but a case of failure to prove the cause of action alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." *Southwick* v. *First National Bank of Memphis,* 84 N. Y. 420, 429. It is fundamental that under such circumstances the Board's finding and order is not supported by substantial evidence and cannot stand. *NLRB* v. *Sands Mfg. Co., supra; Dunham* v. *Cudlipp, supra; McNeil* v. *Cobb, supra; NLRB* v. *Citizen-News Co., supra.*

This point was squarely raised not only by petitioner's motions to dismiss the complaint at the end of the Board's case (R.A. 174-6) and at the end of the entire case (R.A. 325-6); not only by the specific exceptions taken by respondent to the finding under discussion contained in the Trial Examiner's Intermediate Report (see Exceptions 209, 210, 217, 226, 227; R.A. 526-528) but also upon petitioner's oral argument before the Board and in its brief to the Board in opposition to the confirmation of the Intermediate Report which the Board nevertheless adopted. It was also raised, of course, before the Circuit Court of Appeals (R. 64).

Nor can the Board successfully contend that because the exacting standards of a court of law do not apply with strictness to proceedings before the Board or other administrative tribunals, this violation by the Board of the fundamental rule of due process—that final judgment or order must be *secundum allegata et probata*—does not invalidate its order. While it is true that the strict rules of pleading have no application, and that no particular form or exact accuracy of pleading is required (*NLRB* v. *Sunbeam Electric Mfg. Co.*, 133 Fed. [2d] 856; *Consumers Power Co.* v. *NLRB*, 113 Fed. [2d] 38) and while it is true that the strict rules of evidence do not apply in proceedings before the Board (§ 10b Act), nevertheless the purpose of the complaint still remains to fairly apprise the employer of the facts constituting the offense with which it is charged and of the issue which it will be required to meet (§ 10b Act; *NLRB* v. *Sunbeam Electric Mfg. Co., supra*) and the purpose of the hearing still remains to litigate those charges, and only those, which the employer has been summoned to defend (§ 10b Act), save and except where there is such an open and clearly understood purpose to try new issues that the parties are not misled or surprised to their prejudice; and then the pleadings must be amended to conform to the proof. *McNeil* v. *Cobb, supra; NLRB* v. *Citizen-News Co., supra; Ritzwoller Co.* v. *NLRB*, 114 F. (2d) 432 (C. C. A. 7, 1940); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 340. All of this is not only implicit in any proceeding, judicial or quasi-judicial alike (*Morgan* v. *U. S.* (2 cases), *supra; Interstate Commerce Commission* v. *Louisville & Nashville RR Co., supra; U. S.* v. *Abilene & Southern Ry. Co., supra; Valley Mould & Iron Corp.* v. *NLRB, supra*), but is also expressly provided for by § 10(b) of the Act[4] and by the Board's own Rules and Regulations,[5] which neither the

[4] See Appendix, p. 43 *infra*.

[5] See Appendix, pp. 46-47 *infra*.

Board nor the Court could rightfully disregard. Indeed, the fact that § 10(b) of the Act expressly circumscribes the power of the Board to amend its own complaint, viz.: it may do so only *before* the issuance of its order, implies that if the Board decides to change the charge in its complaint or to substitute another, it must do so before the issues have been determined and while the employer still has an opportunity to defend against the new charge in the complaint as amended.

The mere fact that the Board as an administrative body, has broad sweeping powers of investigation certainly does not vest in the Board the power to deprive an employer in a proceeding before it of the fundamental and constitutional right of due process; and where as here, in a contested case tried on pleadings in which the issues were clearly defined, there has been an entire abandonment by the Board of the very substance of the main and principal charge which respondent was summoned to defend, and the substitution of another which the employer could not have anticipated and which it had no opportunity to meet, the variance is fatal as violative of due process. *Armand Co. Inc. et al.* v. *Federal Trade Commission,* 84 F. (2d) 973 (C. C. A. 2, 1936); *Valley Mould & Iron Corp.* v. *NLRB, supra; Morgan* v. *U. S.* (2 cases) *supra; NLRB* v. *Baldwin Locomotive Works,* 128 F. (2d) 39 (C. C. A. 3, 1942); *Singer Mfg. Co.* v. *NLRB,* 119 F. (2d) 131 (C. C. A. 7, 1941).[6]

[6] It is to be noted in passing this point, that the situation in the case at bar is different from that which existed in *NLRB* v. *Yale & Towne Mfg. Co.,* 114 F. (2d) 376 (C. C. A. 2, 1940). In that case the Court held that where the Board's complaint, after specific acts are charged against the employer, also charges "and by these and other acts respondent did interfere with, restrain and coerce its employees in the exercise of the rights guaranteed by Section 7 of the Act," and there is no request for a bill of particulars, no surprise and no lack of opportunity for the employer to make its defense, the Board may hear and determine another unfair labor practice of similar character although not specifically alleged. In this case there is no such allegation in the Board's complaint. On the contrary, the complaint here, after specifically alleging the discharges and other acts claimed to constitute unfair labor practices, specifically alleges that respondent "has by the *aforesaid* acts and conduct interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" (Complt. par. 19 end, B. Ex. 1(2), R.A. 339); that "By its discharge of and refusal to reinstate employees

It follows for the reasons above stated that the Board's finding to the effect that the 15 men were not discharged at all cannot stand.[7]

B.

Since the discharge of those 15 men on November 3-4 was conclusively established by the pleadings, and since the Board made no finding that such discharges were discriminatory or otherwise violative of the Act, those men must be deemed to have been validly discharged and their employee status terminated as a matter of law.

It is fundamental that the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Associated Press* v. *NLRB*, 301 U. S. 103; that the employer may discharge or refuse to employ or re-employ for any reason, just or unjust, so long as it is not for union activities, *NLRB* v. *Tex-*

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as described above in paragraph 4 through 14 inclusive, and by all of *said* acts, and each of them, respondent did discriminate and is discriminating in regard to the hire or tenure or conditions of employment of said employees, and did *thereby* engage in and is *thereby* engaging in an unfair labor practice within the meaning of Section 8, subdivision (3) of the Act'' (Complt. par. 22, B. Ex. 1(2), R.A. 339, 340); that ''By its refusal to bargain collectively with the union * * * *as alleged above* * * * respondent did engage in and is *thereby* engaging in an unfair labor practice within the meaning of Section 8, subdivision (5) of the Act'' (Complt. par. 23, B. Ex. 1(2), R.A. 340); that ''By all the acts and conduct *alleged above* * * * and by all of *said* acts and each of them, respondent did engage in and is *thereby* engaging in an unfair labor practice within the meaning of Section 8, subdivision (1) of the Act''; (Complt. par. 24, B. Ex. 1(2), R.A. 340); and that ''The aforesaid acts of respondent *as hereinabove set forth* constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5), and Section 2, subdivisions (6) and (7) of the Act'' (Complt. par. 26, B. Ex. 1(2), R.A. 340).

[7] The Court below, in taking a contrary view and in sustaining the Board's order, relied on the authority of *National Labor Relations Board* v. *Mackay*, 304 U. S. 333, which it held to be here controlling on the issue of due process (R. 66-67). This was clear error. In the annexed petition, under the heading ''Reasons Relied on for the Allowance of the Writ,'' we fully discuss this phase of the decision below, and demonstrate (pp. 13-15, *supra*) that the Circuit Court of Appeals manifestly misread the teaching of the *Mackay* case and improperly extended its authority to the clearly distinguishable factual situation in this case. We therefore respectfully refer the Court to that discussion (pp. 13-15, *supra*), and do not repeat same here.

O'Kan Mills, 122 F. (2d) 433, 438 (C. C. A. 5, 1942); *NLRB* v. *Riverside Mfg. Co.*, 119 F. (2d) 302, 307 (C. C. A. 5, 1941); *Harp* v. *NLRB*, 138 F. (2d) 546 (C. C. A. 10, 1943); that the presumption is that the employer has not violated the Act; that the employer need not prove non-discrimination because of union activities, rather the Board must prove discrimination because thereof, *Interlake Iron Corp.* v. *NLRB*, 131 F. (2d) 129 (C. C. A. 7, 1942); *NLRB* v. *Union Mfg. Co.*, 124 F. (2d) 332 (C. C. A. 5, 1941).

We have already demonstrated that by the admissions in the pleadings, the discharges of the 15 men on November 3-4 were conclusively established. Inasmuch as there is no finding by the Board that such discharges were discriminatory or coercive in violation of § 8(3) or § 8(1) of the Act (the Board having erroneously found that the men were not discharged at all), the validity of the discharges is unassailable as a matter of law (same cases).

Furthermore, from the conclusive fact that the discharges were for valid cause, it follows as a legal consequence that the 15 men involved lost their status as respondent's employees upon their discharge notwithstanding the strike. *NLRB* v. *Jones & Laughlin Steel Corp., supra; Associated Press* v. *NLRB, supra; NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. As the Supreme Court pointed out in the *Fansteel* case, the Act does not interfere with the right of the employer to discharge for any reason not specifically condemned by the Act; that where, as here, the discharge is not for the purpose of coercion or intimidation proscribed by the Act, but rests upon an "independent and adequate basis" which would have been good reason for discharge had there been no strike (and this means any reason or no reason at all, other than anti-unionism), the employee's status is thereby terminated notwithstanding the strike; and that § 2(3) of the Act which defines the term "employee" as an individual "whose work

has ceased as a consequence of or in connection with any current labor dispute" does not protect the status of an employee who is discharged for valid cause, merely because he happens to be on strike. Answering a contrary contention of the Board in that case, to the effect that § 2(3) did afford such protection, the Court said at page 255:

> "We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision."

The status of those 15 men as respondent's employees was therefore terminated upon their discharge on November 3-4.

C.

There is no basis for the Board's finding that petitioner's refusal of reinstatement to those 15 men, when requested on December 5th, constituted discrimination in violation of the Act. Basically, that finding is erroneous because it rests on the same erroneous finding that those 15 men were not previously discharged on November 3-4. Hence, the Board's order, insofar as it directs their reinstatement, is wholly unwarranted.

1. In discussing the subject of petitioner's refusal to reinstate those 15 men on December 5th, the Board starts with the premise that they were not discharged for sabotage on November 3-4 (B.A. 123), and points to its previous

finding that they were merely "threatened" on that date with loss of their jobs (B.A. 116-118). The Board then finds that petitioner refused to reinstate those men on December 5th in order to make good that threat (B.A. 128); that its reason for refusing reinstatement was "its primary determination to make good its threat to the strikers of loss of employment" (B.A. 128).

Since, as we have previously shown, those 15 men were actually discharged on November 3-4, not "threatened" with discharge, the very foundation upon which the Board rests its finding of discriminatory refusal to reinstate, collapses. For, if what the Board regarded as a mere "threat" of discharge on November 3-4, was in fact a discharge, petitioner's refusal to reinstate on December 5 could not have been for the purpose of making good the non-existent "threat" which was in truth a discharge. In brief, the Board's finding erroneously *assumes* that up to December 5th, those 15 men retained their status as striking employees, whereas, in fact, as previously shown, they had been discharged on November 3-4 and their employee status thereby terminated. Petitioner was under no obligation to reinstate those men after they had been lawfully discharged for valid cause; and the Board exceeded its powers under the Act in directing their reinstatement. *Hazel-Atlas Glass Co.* v. *NLRB*, on rehearing, 127 F. (2d) 118; *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332; *NLRB* v. *Thompson Products, Inc.*, 97 F. (2d) 13; *NLRB* v. *Remington Rand*, 94 F. (2d) 862; *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. There is no claim or finding by the Board that petitioner discriminated against those men by failing to *hire* them as *new* applicants for jobs, because of their union activities. Hence the principle enunciated in *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, has no application.

D.

By reason of petitioner's valid discharge for cause of the 15 men on November 3-4 and the filling of their jobs by new non-union employees on November 3-4, the Union lost its majority status; and petitioner was therefore under no duty to then or thereafter bargain with the Union.

At the time of the strike on November 3, petitioner had in its employ a normal staff of 39 individuals within the unit which the Board has found appropriate (R. Ex. 31, R.A. 465; B.A. 24, Footnote 16; B.A. 48, Footnote 46). Of these 39, the union represented 34, they being the 34 employees who went out on strike (B. Ex. 15, B.A. 1285-6; B.A. 55). The remaining 5 neither signed authorization cards nor went on strike (B.A. 48, Footnote 46; B. Ex. 15, B.A. 1285). On November 3-4 petitioner, as previously shown, discharged for cause 15 of the 34 represented by the union, leaving only 19 union adherents. Assuming for the purpose of this discussion that those 19 *strikers* continued thereafter to retain their status as "employees" during the strike,[8] they did not constitute on November 4 or at any time thereafter, a majority of petitioner's employees. This, for the reason that petitioner had a clear right to immediately replace the 15 *discharged* employees *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332; *Matter of U. S. Stamping Co.*, 1 NLRB 123; *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Hazel Atlas Glass Co.* v. *NLRB*, 127 F. (2d) 118 (C. C. A. 4, 1942); *Wilson & Co.* v. *NLRB*, 120 F. (2d)

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[8] Since, as the Board found, the strike was not caused by any unfair labor practice on the part of respondent, and since, as will be later demonstrated, the strike was not prolonged by any unfair labor practice on the part of respondent, the filling of the jobs of these strikers which occurred before they applied for reinstatement on December 5, actually did result in a loss of their employee status. *Black Diamond Steamship Corp.* v. *NLRB*, 94 F. (2d) 875 (C. C. A. 2, 1938); *Mackay Radio & Telegraph Co.* v. *NLRB*, 304 U. S. 333. Nevertheless, in here treating with the subject of the Union's lack of majority representation, we shall assume that all these 19 strikers retained their status as employees.

913 (C. C. A. 7, 1941) and actually did so on November 3-4 (R. Ex. 31(a), R.A. 466). Concededly, the 15 new employees who replaced those discharged, were not members of the union; and they together with the 5 old non-union employees who had continued working notwithstanding the strike (B.A. 48, Footnote 46) made a total of 20 non-union employees, compared to the union's 19. Thus, on November 4 the union had lost its majority status,[9] and it is uncontroverted that the union never thereafter acquired a majority.[10]

Since the union's loss of majority was the result of the valid discharges and not the result of any unfair labor practice on the part of petitioner (the Board having itself found that up to the time of the discharges the petitioner had been bargaining in good faith), and since the Act requires an employer to deal only with a bargaining rep-

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[9] The record discloses and the Board found that on November 4, the day following the start of the strike, and the first date on which respondent was found to have refused to bargain (B.A. 109, 140), respondent had already engaged, and had working, a new staff consisting of 23 persons (B.A. 55, Footnote 55; R. Ex. 31(a), R.A. 466). Only one of these 23 was represented by the Union, he being Capozucchi, a striker who returned to work on that day (B.A. 55). Thus, on that date there were 22 non-union employees working, 1 Union employee working, and 18 employees on strike. Assuming, *arguendo*, that the 19 strikers retained their status as employees and were to be considered as such on November 4, respondent's total employees on that date, both working and on strike, were 41 (*Matter of Rudolph Wurlitzer Co.*, 32 NLRB 163), of which the Union represented only 19 or less than a majority. Even if we assume that the "Sartorius doctrine" rather than the "Wurlitzer doctrine" is here applicable and that persons who replaced strikers are not to be counted in determining majority representation (see *NLRB* v. *Sartorius & Co.*, 140 F. (2d) 203, C. C. A. 2, 1944), the result would be that only 2 of the 22 non-union working employees would be eliminated as replacements of strikers, the remaining 20 being the 5 who never went on strike and the 15 who replaced the discharged employees of equal number. In that case the total number of employees working and on strike would again be 39, the number of respondent's normal staff, of which the Union represented only 19, or again less than a majority.

[10] It is undisputed that the number of employees represented by the Union was never increased after November 4, whereas respondent did increase its working staff steadily after that date (B.A. 55, Footnote 55). On November 5 there were 28 working, on November 6 there were 30, on November 7 there were 31, and on November 12 a still greater number (B.A. 55, Footnote 55). None of these, except Capozucchi, was a Union member (B.A. 55). Thus, the extent of the Union's representation never reached a majority after November 4, on which date, as above demonstrated, it likewise had no majority.

resentative designated by a *majority* of the employees within the unit (§ 9(a) Act; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Matter of U. S. Stamping Co.*, 5 NLRB 172), petitioner's refusal to bargain with the union on and after November 4 did not constitute a violation of § 8(5) as the Board erroneously held; and the Board's order insofar as it directs petitioner to bargain with the union cannot stand. *NLRB* v. *Fansteel Metallurgical Corp., supra; NLRB* v. *Sands Mfg. Co., supra; NLRB* v. *Franks Bros.*, 137 F. (2d) 989 (C. C. A. 5, 1943) aff'd 64 S. Ct. 817.

POINT II

(On Questions Presented #4 and 5)

The holding of the Circuit Court of Appeals that the 15 men were discharged and that the Board had in effect so found was palpable error because the Board had expressly refused to so find, and the Court was without power to make such a finding *de novo*.

The clear error committed by the Circuit Court of Appeals lies in the fact that, in order to sustain the Board's order, it unwarrantedly read into the Board's decision a finding of fact which the Board had expressly refused to make, and without which the order cannot stand. The Court held that petitioner's refusal to reinstate the 15 men on December 5th, 1940, constituted their "discharge"; that the Board had, in effect, so found; and that the Board's finding of such "discharges" on December 5th, 1940, fell within the reasonable limits of the allegations in the complaint to the effect that those men had been discharged "on or about" November 3 and 4, 1940 (R. 65). In brief, the Court held that the Board had proved the cause of action alleged in its complaint; that the men *had* been dis-

charged as the complaint alleged, and that the Board had so found.

What the Court wholly ignored—and clearly without warrant—is that the Board had *refused* to make any such finding and had expressly dismissed the complaint insofar as it alleged the discharge of those men. The Board's order specifically provided:

> "It is further ordered that the complaint be, and it hereby is, dismissed, insofar as it alleges that the respondent: (1) discharged any of its employees on or about November 3 and 4, 1940; * * *" (B.A. 7).[11]

Manifestly, the Court's decision cannot possibly be reconciled with the above-quoted provisions of the Board's order. Obviously, the Board could not and did not find that the men had been discharged within the allegations of the Complaint which the Board itself thus expressly dismissed. The finding that the men had been discharged was made by the Court, not by the Board; and such a finding *de novo* the Court had no power to make. Under the Act, the Court has not the same power as in reviewing a Master or a Judge, but is limited to determining whether there is substantial evidence to support the Board's finding (*National Labor Relations Board* v. *Moench Tanning Co.*, 121 F. (2d) 951.)

Since the Court could not, and the Board did not, make a finding that the 15 men were discriminatorily discharged, the Board's order cannot stand (Point I, *supra*).

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[11] In the face of the Board's above dismissal of the complaint, insofar as it alleged that any discharges had occurred, it surpasses understanding on what theory the Court could suggest, as it did in its opinion (R. 67), that petitioner should have moved to adduce additional evidence as to the *time* of the discharges—discharges which the Board expressly found had never occurred.

POINT III

(On Question Presented—#6)

It was an abuse of discretion for the Board and Circuit Court of Appeals to deny petitioner's motions for leave to adduce additional evidence as to the sabotage committed at petitioner's radio station on November 3-4, 1940, and as to the bearing of such sabotage upon petitioner's discharge of and its refusal to reinstate the 15 men.

In opposing petitioner's motion in the Circuit Court of Appeals for leave to adduce additional evidence, the Board expressly admitted that it issued its order against petitioner, "without determining whether in fact any sabotage had been committed," as the petitioner had asserted throughout the hearing (R. 62; R.A. 555). The Board contented itself with the finding that the record did not establish that the union or the strikers individually participated in or had knowledge of the commission of sabotage, if, in fact, any was committed (B.A. 128). But therein lies the very error of the Board. Naturally, because of the circumstances under which the sabotage was committed, petitioner was unable to identify the particular culprits actually responsible therefor. But it was not necessary for petitioner to *prove* that the discharged men had actually engaged in the sabotage or abetted such conduct, in order to justify its refusal to reinstate them. It was sufficient that petitioner acted in the honest *belief* that the men present at the studio and transmitter on November 3-4 had committed the sabotage, or aided, abetted, assisted or permitted others to commit such sabotage, or failed to prevent such sabotage with knowledge thereof (B.A. 992), and that it discharged and refused to reinstate them in that belief, as petitioner established (B.A. 992). (*Peninsular & Occi-*

dental S. S. Co. v. *NLRB,* 96 F. (2d) 411.) Hence, a clear-cut determination by the Board of the issue as to whether or not sabotage had been committed was manifestly imperative in this case, because it would have been determinative of the question of the bona fides of the discharge of the 15 men.

Since the Board found itself unable to resolve the question on the record evidence before it, it was an abuse of discretion to deny petitioner's application to adduce the additional cogent and potent evidence at hand on that question (R. 7-38). The Circuit Court of Appeals no less abused its discretion when it refused to grant petitioner's similar application subsequently made to the Court, notwithstanding the clear showing by petitioner of valid reasons for its failure to adduce such additional evidence during the hearings. (Sec. 10(e) Act; *Corning Glass Works* v. *NLRB,* 129 F. (2d) 967, 972.)

POINT IV

(On Question Presented—#7)

The holding of the Board that petitioner's refusal to treat with the Union during the strike and before the questions of appropriate unit and the Union's majority representation were determined by the Board constituted a violation of Section 8(5) of the Act, was clear error.

The record in this case discloses an agreement between the union and the petitioner, entered into prior to the strike, to have both the unit question and the question of the union's majority status determined by the Board. This agreement was itself the result of collective bargaining between the union and petitioner (B.A. 26) and was fol-

lowed by the actual submission of those questions to the Board by the filing of a petition under § 9 of the Act (B.A. 26). Since neither of those questions was ever determined by the Board, wholly as a result of the unilateral action of the union in "tabling" the representation proceeding coincident with the strike (B.A. 1299), petitioner was under no duty, as the Board erroneously held, to recognize the union as bargaining agent, or to bargain with the union on the basis of the unit contended for by the latter. (*Matter of Huch Leather Co.*, 11 NLRB 394; *Matter of Spicer Mfg. Co.*, 51 NLRB No. 114; *Matter of McGough Bakeries Corp.*, 58 NLRB 168; *Matter of Iowa Electric Co.*, 38 NLRB 209; *NLRB* v. *Empire Furniture Co.*, 107 F. (2d) 92 (C. C. A. 6, 1939); *NLRB* v. *Remington Rand Co.*, 94 F. (2d) 862 (C. C. A. 2, 1938); *Black Diamond Steamship Corp.* v. *NLRB*, 94 F. (2d) 875 (C. C. A. 2, 1938); *Matter of Bonafide Mills Inc.*, 38 NLRB No. 133; *NLRB* v. *Algoma Plywood and Veneer Co.*, 121 F. (2d) 602 (C. C. A. 7, 1941); *NLRB* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552 (C. C. A. 6, 1940).)

Since the Board's order, insofar as it directs petitioner to bargain with the union, rests on the erroneous legal ground that petitioner was under a duty to bargain with the union notwithstanding the circumstances above stated, that portion of the order cannot stand.

POINT V

(On Question Presented—#8)

The Board's findings that the strike was prolonged by unfair labor practices and that petitioner discriminated against strikers who were not discharged, were not supported by substantial evidence.

As previously stated, 34 employees joined in the strike. Of these, 15 were at once discharged by petitioner by reason of the sabotage, as already shown. Of the remaining 19, 12 were subsequently reinstated by petitioner and 7 were not reinstated. It is undisputed that such latter 7 employees were not reinstated because their jobs were filled by petitioner after they went on strike and before they applied for reinstatement (R.A. 156-158); and since, as the Board found, the strike was not caused by any unfair labor practices on the part of petitioner, and since there is not a scintilla of evidence to support the Board's finding that the strike was prolonged by unfair labor practices on the part of petitioner, the direction of their reinstatement with back pay transcended the powers of the Board. (*NLRB* v. *Mackay Telegraph Co.*, 304 U. S. 333.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the brief.

APPENDIX

National Labor Relations Act (49 Stat. 452)

Sec. 2(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.

Sec. 8. It shall be an unfair labor practice for an employer:

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the

exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

Sec. 9(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

Sec. 10(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

Sec. 10(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and

of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C. title 28, secs. 346 and 347).

Rules and Regulations of the National Labor Relations Board, Series 2 (in Effect at the Time of the Hearing and Order in this Proceeding—Later Amended on November 8th, 1943, by Series 3 Now in Effect).

Article II Sec. 5. After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than ten days after the service of the complaint. A copy of the charge upon which the complaint is based shall be attached to the complaint. • • •

Sec. 7. Any such complaint may be amended upon such terms as may be deemed just; prior to the hearing, by the Regional Director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to Sec. 32 of this Article, upon motion, by the Trial Examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to Sec. 32 of this Article *at any time prior to the issuance of an order based thereon,* by the Board.

Sec. 10. The respondent shall have the right, within ten days from the service of the complaint, to file an answer thereto. Such answer shall contain a short and simple statement of the facts which constitute the grounds of defense. The respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a

denial. Any allegation in the complaint not specifically denied in the answer, unless the respondent shall state in the answer that the respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Board.

Sec. 13. The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the Trial Examiner or the Board. * * *

Sec. 23. The hearing for the purpose of taking evidence upon a complaint shall be conducted by a Trial Examiner designated by the Board or the Chief Trial Examiner. * * *

Sec. 24. It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. * * *

Sec. 27. In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.





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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1166

GREATER NEW YORK BROADCASTING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 64–67) [1] is reported in 147 F. 2d 337. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 1–145) are reported in 48 N. L. R. B. 718.

[1] The two volumes printed by the Board as an appendix to its brief in the court below are herein referred to as "B. A.," the volume printed by petitioner as an appendix to its brief in the court below is referred to as "R. A.," and volume IV of the transcript of record in this Court is referred to as "R."

JURISDICTION

The decree of the court below (R. 68–71) was entered on February 26, 1945. The petition for a writ of certiorari was filed on April 16, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an order of the National Labor Relations Board must be denied enforcement solely because the complaint alleged that petitioner, in violation of Section 8 (3) of the National Labor Relations Act, had discharged certain striking employees on or about November 3 and 4, 1940, and had failed to reinstate these employees thereafter, while the Board, notwithstanding this allegation and petitioner's admission in its answer that it had discharged the employees albeit for cause, found that petitioner had not discharged its employees but had violated Section 8 (3) by refusing to reinstate the striking employees on about December 6, 1940.

2. Whether, in the light of all the circumstances, the Board and the court below abused their discretion in denying petitioner's motions to adduce additional evidence.

3. Whether there is substantial evidence to support the Board's findings (a) that on and after November 4, 1940, petitioner had no bona fide

doubt that a majority of its employees within an appropriate bargaining unit had designated the Union to represent them; and (b) that a strike called by the Union was prolonged by petitioner's unfair labor practices.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 26–28.

STATEMENT

Upon charges filed by the Union, Local 16 of the American Communications Association, C. I. O., the Board issued its complaint alleging, *inter alia*, that petitioner had discharged 33 employees on or about November 3 and 4, 1940, and thereafter refused to reinstate 21 of them and delayed reinstatement of 12 others "because they joined and assisted the Union and * * * engaged in a strike and other concerted activities for the purpose of collective bargaining and other mutual aid or protection" (R. A. 333–336, 339–340); that petitioner had refused to bargain with the Union and otherwise interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act (R. A. 337–339); and that these unfair labor practices had caused and prolonged a strike which began on or about November 3 and 4, 1940 (R. A. 339). Petitioner filed an answer denying that it had

engaged in any of these unfair labor practices and alleging that it had discharged 15 of the employees named in the complaint and thereafter refused to reinstate 14 of them, but that the discharges and refusals to reinstate had been for good and sufficient cause and not for discriminatory reasons as alleged in the complaint, and that the other employees had voluntarily left petitioner's employ and had been replaced by new permanent employees (R. A. 342–350).

A hearing was had before a trial examiner who thereafter issued his intermediate report in which he found that petitioner (1) in violation of Section 8 (5) of the Act refused to bargain collectively with the Union and otherwise interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them by the Act, thereby prolonging a strike which had been called by the Union; (2) in violation of Section 8 (3) of the Act discriminated in regard to the hire and tenure of its striking employees after they applied for reinstatement, by denying reinstatement to 21 of them and delaying reinstatement of, and otherwise discriminating against, others; and (3) by these and other acts engaged in unfair labor practices in violation of Section 8 (1) of the Act (B. A. 107, 109, 115–135). Petitioner thereupon filed with the Board exceptions, a brief, and a motion to reopen the record for the purpose of introducing additional evidence to support testimony which

it alleged that the trial examiner had not credited (B. A. 1, R. 50). The Board, on March 30, 1943, issued its decision and order adopting, with exceptions not here material, the report of the trial examiner and denying petitioner's motion to adduce additional evidence (B. A. 1–8). The Board's findings, together with the evidence in support thereof, insofar as they are pertinent to the issues here involved, may be summarized as follows:[2]

Through a process of gradual accretion, the Union, by 1940, had come to represent three groups of petitioner's employees—announcers, technicians, and sound effects men, and had closed-shop contracts with petitioner covering them (B. A. 18–19; 197–199, 216–217, 356, 457–459, 469). By the time the contracts expired simultaneously on October 1, 1940, the Union claimed to have been designated by a majority of the employees not only in these three groups, but also in another group of "miscellaneous employees," and requested petitioner to bargain with it for the four groups as one unit (B. A. 18–19, 24, 25–26; 199, 436–438, 445–446). Petitioner refused to do this and based its refusal on an alleged doubt that the Union had been designated by a majority of the employees

[2] In the following statement "B. A." references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting testimony.

within the miscellaneous group (B. A. 24, 25–26; 437–438). The Union thereupon agreed to file and did file with the Board's Regional Office a petition requesting the Board to investigate and certify the collective bargaining representative within the allegedly appropriate four-group unit (B. A. 26; 400, R. A. 461).[3]

Subsequent events, however, made it unnecessary for the Board to proceed with the representation petition. Petitioner and the Union entered into a compromise arrangement whereby bargaining on substantive terms and conditions of employment was to proceed without regard to the unit and representation questions, and the terms agreed upon were to be embodied in separate contracts for each of the groups involved (B. A. 35; 454–455, 513–515, 666–668, 928–929). The extent of the Union's representation of the miscellaneous employees, the only group in which petitioner questioned the Union's majority status, was then to be decided by an election among the miscellaneous employees, the outcome of which was to determine whether petitioner would bargain with the four groups as a single unit (B. A. 35–36; 454–455, 513–515, 666–668, 928–929). Negotiations on this basis proceeded until the afternoon of November 3, 1940, when the Union, believing that petitioner was not

[3] The Board's finding (B. A. 97–98) that the four groups in fact constitute a single appropriate bargaining unit is not here in issue.

bargaining in good faith, called a strike (B. A. 36, 40–41; 450–451, 455–456, 469–470, 691, 916–918, 961). On the following morning, November 4, petitioner summoned to its offices many of the miscellaneous employees and confronted them with a choice of remaining "loyal" to petitioner and staying at their jobs or of joining the strike and losing their jobs (B. A. 46–48; 700–701, 712, 713–714, 719, 721, 729–730, 734, 735). A majority of the miscellaneous employees, all but two of those interviewed, decided to participate in the strike (B. A. 47–48; 1012, 1016, 1285–1286). Petitioner, by thus polling the individual miscellaneous employees, not only resolved any doubt which it might theretofore have entertained concerning the Union's representation of a majority of that group, but it also resolved any doubt which it might have entertained toward the propriety of a four-group unit since petitioner's real objection to the single unit was based upon its doubt that the Union actually represented the miscellaneous employees (B. A. 101, 106).[4]

Petitioner attempted to induce not only the miscellaneous employees but also the other strikers

[4] Union representatives, after learning of petitioner's interviews with the individual miscellaneous employees on the morning of November 4, complained to a Board field representative that petitioner was attempting to intimidate those employees and requested that the representation petition theretofore filed be "tabled" (B. A. 50; 1298–1299).

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to abandon the Union and return to work. On the morning of November 4 it informed one of the striking engineers that "All you people who refuse to come back to work are through" (B. A. 48–49; 236–237, 349). On the same morning, when petitioner's representatives arrived at the transmitter in New Jersey, they urged two strikers, who had been delegated by the Union to guard the transmitter, to return to their posts and put the station back on the air, warning them that if they remained on strike they would never be reinstated (B. A. 45; 1014–1015, 1164–1165, 1250–1251). During the next few days, petitioner made similar attempts to induce other strikers to abandon the Union and return to work (B. A. 58–59; 1093–1094, 1097–1100, 1150).

Petitioner admittedly refused to bargain with the Union on and after November 4 (Br. 36; B. A. 109). On that date, the Union made efforts, through the Board's regional office and the New York State Mediation Board, to arrange bargaining conferences with petitioner (B. A. 2, 49–50; 548, 1103–1104, 1189–1191, 1199–1200). To the Board representative, petitioner stated that it would not meet with the Union until the employees abandoned the strike, explained certain conditions labeled "sabotage" by petitioner, and informed petitioner of the whereabouts of some of its property (B. A. 50–51; 1191–1192, 1195, 1198–1199, 1202, 1205–1206, 1298). To the state mediator,

petitioner stated that it would not meet with the Union because the latter had called a strike in the face of arrangements for another conference and because of the commission of certain undesignated acts of "sabotage" by the strikers (B. A. 49; 1106–1107). To the Union's letter of November 6, "again asking for a meeting to negotiate a contract", petitioner's general manager replied, *inter alia,* that the employees present "when the decision was made to take the station off the air thereupon retired and left our employment," and that responsibility for "acts of omission and commission which evidently occurred at the time the station was taken off the air * * * must be established and to which I feel that under the circumstances you should lend your assistance" (B. A. 56–58; 1306–1309). Thereafter, at a meeting of the Union and petitioner with a Board field examiner on November 8, and in subsequent correspondence with the Union, petitioner took the position that it was investigating the responsibility of strikers for having taken the station off the air and for having, it believed, tampered with its equipment at the studios and transmitter, and that it did not intend to reinstate any employees guilty of these acts (B. A. 59–60, 61–62; 405, 410–411, 545–546, 549–550, 1315, 1317–1318).

By its interviews with the miscellaneous employees, its threats and other statements to them and to other employees on November 4 in attempt-

ing to induce them to abandon the strike, and by its refusals to bargain with the Union on November 4 and thereafter, petitioner engaged in unfair labor practices which prolonged the strike (B. A. 107, note 84, 109).

On December 5, the Union called off the strike and requested petitioner to reinstate the strikers (B. A. 65; 411–412, 1319). Petitioner replied on the following day, stating that it had "forthwith discharged," for having tampered with the equipment or aided or abetted other employees in doing so, 15 of the strikers whom it did not name and whose number it said might be increased or decreased as a result of further investigation; it stated further that there were a few jobs available for strikers whom it believed innocent of misconduct (B. A. 65–69; 412, 1320–1323). Thereafter the strikers made individual applications for reinstatement at which time they were questioned concerning the whereabouts of themselves and of other employees at the time the strike was called and concerning the alleged tampering or "sabotage" (B. A. 74–76; 552, 560–561, 616–629, 645–656, 722, 730, 738–740).[5] It was not until December 21, after it had interviewed these employees, that petitioner furnished the names of any employees whom it allegedly refused to reinstate

[5] Electrical transcriptions of these interviews were made, but petitioner refused to produce them at the hearing (B. A. 76–77; 153–155, 417–428, 556–559, 624–625, 652–656).

because of misconduct (B. A. 81–83; 737, 1302–1303).[6] Its selection of these names, petitioner concedes, was not based on a discovery that any striker had actually engaged in the alleged tampering or "sabotage," but merely on information that he was either at the studios or transmitter at the time the strike occurred or shortly thereafter (B. A. 123–124; 991–992, 995, 1036).

Through one Holt, an engineer hired by petitioner to put the station in operation after the strike started, petitioner introduced voluminous evidence of the method of operating its station, the condition in which Holt found the equipment, and his difficulties in putting it in operation when he arrived at the studios several hours after the strike commenced and at the transmitter the following morning (B. A. 123–128; 751–775, 778–867, 885–898). Some of the difficulties encountered by Holt arose out of his lack of familiarity with the type of equipment in use at the station and the manner in which it was customarily operated by the regular staff, some of whom had built part of the equipment (B. A. 124–125; 581–582, 597, 612,

[6] Even on that date petitioner stated that its investigation as to the guilt of individual employees was "still pending" (B. A. 80; 415, 1329–1332). It then listed 12 employees whom it believed to be guilty (B. A. 82; 737, 1302–1303). It later added three names to the list, then subtracted one with the explanation that during an interview one of the employees had cleared himself of guilt (B. A. 82–83; 973, 980–981).

755–756, 760–761, 769–770, 779, 784–785, 804–816, 833, 837–838, 847, 1062, 1151–1153, 1216, 1241-1243, 1265–1266, 1268–1271, 1276–1277); other difficulties were accounted for by the fact that certain repairs were not being made on the transmitter because it was at that time being replaced by new equipment (B. A. 125; 673, 827–828, 1070-1071, 1124–1125, 1150–1151, 1156–1158, 1241-1242); still other difficulties were occasioned by construction work in progress night and day at the transmitter, causing the employees, out of regard for the safety of the construction workers, to devise substitutes for some of the equipment and to disconnect other portions of it when it was not in use (B. A. 125; 317–318, 799–802, 922, 930–932, 1054–1060, 1063–1064, 1071, 1156–1158, 1217–1222). Despite these facts, petitioner attributed to "sabotage" all conditions which Holt described as abnormal (B. A. 123; 831–832). But, upon all the evidence, the record does not establish that the Union or any of the strikers, rather than other persons who had access to the premises, participated in the commission of "sabotage," if any was committed (B. A. 128; 304, 307, 752, 775, 936-937). Moreover, "any belief which [petitioner] may have entertained concerning any conditions which may have been found was secondary in determining [petitioner's] course of conduct to its primary determination to make good its threat to the strikers of loss of employment and to avoid

dealing with [the Union] for any group of its employees" (B. A. 128).

Petitioner attempted to prove that it discharged 15 of the strikers on November 3 or 4 (B. A. 116; 405–406, 947–948, 967–969, 972–975, 998–1001, 1034–1036). But as shown *supra*, pp. 7–8, on November 4, after it had completed an examination of the equipment at its studios ((B. A. 1337–1341), petitioner not only sought to induce the strikers to return to work by threatening a loss of their jobs if they remained on strike, but refused to bargain with the Union unless the strikers first returned to work. During the ensuing weeks of the strike, petitioner repeatedly indicated that it had not identified any of the strikers whom it allegedly suspected of "sabotage" and that its investigation was continuing. Moreover, in reporting to the Division of Placement and Unemployment Insurance in December on the unemployment of some of the strikers whom it claimed to have discharged on November 3 and 4 for "sabotage" and misconduct, petitioner reported a labor dispute rather than misconduct as the reason for their idleness (B. A. 118; 943–946, 1303–1304, Union Exh. 12). The petitioner "did not actually discharge any of the strikers on November 3 and 4, but rather used threats of loss of employee status in an attempt to break the strike and later used the contention that it had discharged

employees for sabotage as a subterfuge to avoid bargaining with [the Union]" (B. A. 116–117).

Petitioner refused to displace with a striker any person hired subsequent to its unfair labor practices on November 4 (B. A. 119–120; 567–568, 1000, 1322). As vacancies occurred, the strikers had to compete on an equal basis with other applicants who had not theretofore worked for petitioner (B. A. 119–120; 703–709, 730). Those reinstated were hired as new employees, losing seniority privileges which they had enjoyed prior to the strike, and sometimes being placed in different and inferior positions to those they had formerly held (B. A. 119–122; 412, 414, 1322–1323, 1326–1327). Seven employees, in addition to those whom petitioner allegedly discharged and failed to reemploy, were never reinstated either because they refused to accept less desirable positions than they had formerly held or because petitioner contended that no work was available for them (B. A. 116; 722–723, 725–726, 1322–1323, 1327, 1330–1332). But a job substantially equivalent to that held by each of them was filled by a new employee subsequent to the strikers' applications (B. A. 120; 703–709, 730, R. A. 465, 470–474).

The Board's order required petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union in the appropriate bargaining unit, to reinstate and make whole the strikers against whom petitioner had discrimi-

nated,[7] and to post appropriate notices (B. A. 4–8).

On April 20, 1944, the Board filed in the court below a petition to enforce its order (R. 1–5). On May 19, 1944, petitioner filed a motion for leave to adduce additional evidence concerning the condition and method of operation of its radio station, concerning alleged sabotage at the station, and concerning the bearing of such alleged sabotage upon its refusal to reinstate certain strikers (R. 5–60). The Board opposed the motion (R. 61–63), and the court below, on June 27, 1944, entered its order denying the motion (R. 63). On February 6, 1945, the court handed down its opinion upholding the Board's order (R. 64–67), and, on February 26, 1945, entered its decree enforcing that order (R. 68–71).

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[7] The Board found discrimination against 31 employees (B. A. 1–2, 3–4, 115–123, 136, 145). Of these, 10 (Norman, Suchin, Steinberg, McDonald, Sokal, Garafalo, Corrado, Hopkins, Boley, and Ludlam), one of whom (Boley) had been accused of "sabotage" (B. A. 81–83; 972–974, 1302–1303, R. A. 347), were subsequently reemployed (B. A. 11, note 1, 115, 122–123; 981–983, R. A. 347, 465–474). The remaining 21 were never reinstated (B. A. 11, note 1, 12–14, 116; 730, R. A. 345–346). In this group were 14 (Study, Olsen, Wegge, Kamke, Berry, Alper, Polimeni, Potts, Graham, Dickens, Neuwirth, Kearney, Stratton, Ferri) whom petitioner allegedly refused reinstatement because of "sabotage" (B. A. 13, 81–82, 115; 972–974, 980–981, 1302–1303, 1320–1323). The other seven (Murgia, Tanzman, Murtaugh, Jones, Lowerbraun, Zappula, and Janowitz) either refused to accept less desirable positions than they formerly held or were denied reemployment on the ground that no

ARGUMENT

1. Petitioner contends (Pet. 9–10, 12–15, Br. 19–33) that there is a fatal variance between the complaint and the Board's findings. Petitioner further asserts that the fact of the discharges was conclusively established by the pleadings, was not an issue in the case, and was not litigated at the hearing. It urges that the Board's finding that there was no discharge of employees on November 3 or 4, but rather a refusal to reinstate them on or about December 6, is consequently at variance with the pleadings and cannot be sustained.

Certain of petitioner's employees went on strike. When they sought to return to work, petitioner refused to permit them to do so. As the facts summarized in the Statement (*supra*, pp. 3–14) demonstrate, petitioner had not replaced the strikers with permanent employees before it refused to bargain with the Union, and the real question in the case was whether the refusal to reinstate

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work was available for them (B. A. 13–14, 116; 730, 1319, R. A. 345–346). The Board ordered petitioner to offer immediate and full reinstatement to 27 employees (B. A. 6, 8), and to make 29 employees whole by payment of back pay from December 5, 1940, the date of their application for reinstatement (B. A. 6–7, 8). Three employees (Suchin, Hopkins, and Norman) were laid off or discharged non-discriminatorily after their reinstatement (B. A. 2–3, 7). As to them the Board ordered no reinstatement but only back pay (B. A. 6–7, 8). The Board did not order any affirmative relief for Study (B. A. 3–4) and ordered reinstatement but no back pay for Janowitz (B. A. 3, 6).

the strikers was for cause or on account of the employees' union membership and concerted activities. It was a purely secondary and relatively minor matter whether the unlawful discontinuance of the employment relationship was first effected by a discharge on November 3 or 4 and a refusal to reinstate thereafter, as alleged in the complaint, or only by one of these acts—namely, by a denial of reinstatement on or about December 6, as found by the Board. All three questions—*why, when,* and *how* the strikers were prevented from resuming work—were fully investigated at the hearing, as the evidence summarized in the Statement (*supra,* pp. 5–14) demonstrates. Only the question *why* was really crucial, however, and as to it there was no variance between the complaint and the findings.

In any event, there is not a fatal variance between an allegation of violation of Section 8 (3) of the Act by discriminatory discharges on November 3 or 4, 1940, and refusal to reinstate thereafter, and a finding of violation of Section 8 (3) of the Act by discriminatory refusal of reinstatement on or about December 6, 1940. To be fatal a variance between the pleadings and the proof must be substantial and material and must have misled or surprised the defendant.[8] This Court

[8] *Nash* v. *Towne*, 5 Wall. 689, 698–699; *Washington & Georgetown Railroad Co.* v. *Hickey*, 166 U. S. 521, 531–532; *Baltimore & Potomac Railroad Co.* v. *Cumberland*, 176 U. S. 232, 237–238; *Berger* v. *United States*, 295 U. S. 78, 80–83; *Armand Co., Inc.* v. *Federal Trade Commission*, 84 F. 2d 973, 974–975 (C. C. A. 2), certiorari denied, 299 U. S. 597.

has held that strict rules of pleading and evidence do not apply in proceedings before the Board[9] and that a contention that there is a fatal variance between the pleadings and the proof is "highly technical."[10] Consequently, in Board cases, a variance between the pleadings and the proof is not fatal if the employer was fairly apprised of the general nature of the issues and had full opportunity to defend.[11]

There is no conflict between the decision of the court below and any of the cases cited by petitioner. In each case cited by petitioner in which the court found a fatal variance between the pleadings and the proof, the variance was substantial and material and misled or surprised one of the parties. Thus, for example, in *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, on which petitioner relies (Br. 22, 27), the finding of the Board which the Court set aside "as irrelevant to any issue in the cause" (p. 346) dealt with an

[9] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230.

[10] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349.

[11] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351; *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 557 (C. C. A. 6); *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board*, 111 F. 2d 869, 873 (C. C. A. 7); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 434–435 (C. C. A. 7); *National Labor Relations Board* v. *Yale & Towne Mfg. Co.*, 114 F. 2d 376, 379 (C. C. A. 2).

incident which had no connection with any allegation in the complaint. The complaint alleged discharge of the striking employees as a body, but the Board found a refusal to hire two strikers to be a violation of Section 8 (3) of the Act independent of any of the violations flowing out of the discharge and charged in the complaint. Likewise in *National Labor Relations Board* v. *Citizen-News Co.,* 134 F. 2d 962 (C. C. A. 9), also relied upon by petitioner (Br. 22–23, 26, 27, 28), the Board, apparently without notice to the respondent, found the respondent guilty of violating the Act in a manner not charged in the complaint, not litigated at the hearing, and not dealt with in the trial examiner's intermediate report.

In dealing with this question of variance between the complaint and the Board's finding, the court below held (R. 64–66) that the Board's finding of a discriminatory refusal to reinstate was, "in effect", a finding of discriminatory discharge and was, therefore, within the allegation of the complaint that petitioner discriminatorily discharged the employees in question "on or about" November 3 or 4. As petitioner notes (Pet. 10, 15, Br. 36–37), the Board had, however, dismissed the allegation in the complaint that petitioner had discriminatorily discharged any employees on or about November 3 and 4 (B. A. 7). The Board had instead based its finding upon the allegation in the complaint that petitioner had dis-

criminatorily refused to reinstate the employees in question after November 3 and 4 (B. A. 128–129).[12] The court's conclusion that there was no variance between the complaint and the Board's finding is, therefore, incorrect insofar as it is based upon the court's assumption that the Board had not dismissed the allegation in the complaint to the effect that petitioner discharged certain employees on or about November 3 and 4. The facts summarized in the Statement (*supra*, pp. 3–14) demonstrate, however, that petitioner knew what the issues were, was afforded a full opportunity to introduce evidence in support of its defense, and consequently was not prejudiced or surprised by the difference between the complaint and the Board's finding, adopting the finding of the trial examiner.[13]

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[12] The finding, of course, merely indicated that there was insufficient evidence to support the allegation of discharge on November 3 or 4, but that there was ample basis for the averment of refusal to reinstate thereafter. The Board has on other occasions similarly found that only one portion of the complaint has been shown by the evidence to constitute a violation of Section 8 (3). See, e. g., *Matter of Poultrymen's Service Corp.*, 41 N. L. R. B. 444, enforced, 138 F. 2d 204 (C. C. A. 3).

[13] As shown above, there is no variance between the complaint and the Board's finding with respect to the only crucial question, namely, the *reason* for petitioner's refusal to permit the employees to return to work; and the only claim of variance between the complaint and the Board's finding with respect to the *method* of such refusal turns on the fact that the Board dismissed one part of the complaint in this regard and sustained the other part.

Moreover, as the court below noted (R. 65, 67), if petitioner considered itself prejudiced by the finding that there was no discharge on November 3 and 4, it had ample opportunity to apprise the Board or the court below by a motion to reopen the record for the purpose of taking additional evidence on this question. National Labor Relations Act, Section 10 (c), (d), (e); *Swift & Co.* v. *National Labor Relations Board,* 106 F. 2d 87, 91 (C. C. A. 10). While petitioner did make a motion to adduce evidence on the cause of the termination of employment, it never even claimed that it had any additional evidence as to the date on which or manner in which it took place. Consequently, as the court below correctly held (R. 64, 65–66), there was not a fatal variance. The fact that the court below gave a wrong reason for its holding that there was no fatal variance between the complaint and the Board's finding raises no question for review by this Court. It is well settled that the decision of a lower court will not be reversed if the result is correct even though the lower court may have relied upon a wrong ground or given a wrong reason. *Helvering* v. *Gowran,* 302 U. S. 238, 245; *J. E. Riley Investment Co.* v. *Commissioner of Internal Revenue,* 311 U. S. 55, 59; *Utah Copper Co.* v. *Railroad Retirement Board,* 129 F. 2d 358, 362 (C. C. A. 10), certiorari denied, 317 U. S. 687. Contrary to petitioner's contention (Pet. 10, 13–15, Br. 30), the court below did not mis-

construe and misapply *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. In the case at bar, as in the *Mackay* case, the company "understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory" (304 U. S. at 350).

Finally, admissions in the pleadings, like stipulations between the parties, cannot operate to prevent an adjudicatory tribunal from deciding a case on the facts as they really are. Cf. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 288–289; *Arizona* v. *California*, 283 U. S. 423, 452. Thus petitioner's alleged grievance, founded on the concession in the pleadings, adds nothing to its allegation that there is a fatal variance.

2. Contrary to petitioner's contention (Pet. 11, 15–16, Br. 38–39), the Board and the court below did not abuse their discretion by denying petitioner's motions to adduce additional evidence of the condition and method of operation of petitioner's radio station, of alleged sabotage at the station, and of the bearing of such alleged sabotage upon petitioner's refusal to reinstate certain employees. The evidence sought to be introduced (R. 5–60) bears solely upon the credibility of one of petitioner's witnesses, Holt, on the collateral issue of whether the equipment at petitioner's station was tampered with on November 3–4, 1940. Petitioner asserted (R. 13–18, 24, 45–50) that the

proffered evidence would corroborate part of Holt's testimony at the hearing and would thereby establish the credibility of Holt's testimony concerning the alleged sabotage. The Board did not state, however, that it disbelieved the testimony of Holt as to the conditions characterized by him as "sabotage". Without determining whether any "sabotage" had in fact been committed, the Board found that petitioner's refusal to reinstate its striking employees was on account of their union membership and activities and not on account of the alleged commission of sabotage (B. A. 1–2, 128–129). The evidence sought to be introduced is, therefore, immaterial to any issue in this case. In addition, the proffered evidence is cumulative and merely tends to corroborate evidence already in the record. At the hearing before the Board, Holt himself testified at length concerning the condition and method of operation of petitioner's radio station and the alleged sabotage at the station (Statem , *supra,* pp. 11–13). The evidence sought to b duced was not newly discovered, and petitioner did not show any reasonable grounds for having failed to adduce it at the hearing before the Board.[14] An application to the

[14] The inaccuracy of petitioner's contrary statement (Br. 39) is apparent from a reading of its motion and an attached affidavit (R. 5–25). Petitioner's only excuse for having failed to adduce this evidence at the hearing was that it thought that the trial examiner had already been convinced (R. 17, 23). Certainly the Board and the court below were

Board or a court for leave to adduce additional evidence pursuant to the provisions of the National Labor Relations Act is addressed to the sound discretion of the Board or the court.[15] It was not an abuse of that discretion for the Board (B. A. 1) and the court below (R. 63) to deny petitioner's motion to adduce additional evidence.[16]

3. Petitioner's statement of subordinate questions involved (Pet. 11–12) raises only the issue of the substantiality of the evidence supporting some of the Board's findings. As petitioner concedes (Pet. 11), the questions "perhaps" are "not in themselves of sufficient importance or general interest to warrant" this Court's review. Moreover, the evidence summarized in the Statement (*supra*,

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free to refuse to allow petitioner to try again, since it had already had its opportunity to show that certain of the strikers were responsible for the sabotage and had been discharged and refused reinstatement for that reason.

[15] *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104; *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 889 (C. C. A. 2).

[16] National Labor Relations Act, Section 10 (c), (d), (e); *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104–105; *Pittsburgh Plate Glass Company* v. *National Labor Relations Board*, 313 U. S. 146, 157–158, 161–162, affirming, 113 F. 2d 698, 702–703 (C. C. A. 8); *National Labor Relations Board* v. *Aluminum Products Company*, 120 F. 2d 567, 573 (C. C. A. 7); *Western Cartridge Company* v. *National Labor Relations Board*, 134 F. 2d 240, 244–245 (C. C. A. 7), certiorari denied, 320 U. S. 746; *National Labor Relations Board* v. *Weirton Steel Company*, 135 F. 2d 494, 497–498 (C. C. A. 3); *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 889 (C. C. A. 2).

pp. 5–14, and see note 4, *supra,* p. 7), furnishes ample support for the challenged findings, as the court below held.

CONCLUSION

The decision of the court below is correct. It gives rise to no conflict of decisions and involves no question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * *
>
> SEC. 10. * * *
>
> (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint

has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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